Supreme Court
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

Ann Kletzelmann,

Petitioner,

versus

Capistrano Unified School District, et. al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A) Whether Petitioner was entitled to a jury trial when the Petitioner and the District Court began its evidentiary hearing under the assumption no Answer had been filed; however, Respondent had in fact filed an Answer, and even though Respondent had not properly served Petitioner with the Answer as demanded under FRCP 12 (B)(5), the District Court and the Respondent agreed to immediately change the proceedings from an evidentiary hearing into a judge trial over Petitioner's numerous demands for a jury trial?

B) Whether the was a "disagreement" for the purposes of attorney fees under IDEA when Petitioner stated and wrote down DISAGREEMENT on the 4/93 IEP and at the "evidentiary hearing" the District Court cross-examined Respondent's Attorney who finally admitted Respondent did not agree with Petitioner?

PARTIES TO THE PROCEEDING

The parties to the proceeding in United States Court of Appeals for the Ninth Circuit are Respondents, Capristano Unified School District and Capristano Unified School District Board of Education and Petitioner, Ann Kletzelman.

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JURISDICTION

The District Court had subject matter jurisdiction pursuant to 20 U.S.C. § 1415(e)(4)(B). The judgment appealed from is the final decision of the district court, and therefore its final order. This court has jurisdiction pursuant to 28 U.S.C. § 1291. Judgment of the District Court of California for the Central district was entered on February 10, 1994 (see Appendix I) and the Judgment of the United States Court of Appeals for the Ninth Circuit was entered on November 15, 1995. (see Appendix II)

I. Introduction

i) Certiorari Should be Granted Due to the Importance of Having an Effective Right to Trial.

There is an important and recurring nature of the issue in conflict here that justifies the granting of certiorari.

The right to trial, in addition to being intrinsically important, is undoubtedly "beyond the academic or the episodic." Rice v. Sioux City Cemetery, 349 U.S. 70, 74 (1955).

There have been several prominent types of cases in which the Court seems to have granted certiorari predominantly to correct an

erroneous ruling on the particular facts. Most of these cases arose under the Federal Employers' Liability Act or its maritime companion, the Jones Act.[2] Certiorari was often granted in such cases "because of the importance of preserving for litigants in FELA cases their right to a jury trial." Wilkerson v. McCarthy, 336 U.S. 53, 55 (1949).

Justice Douglas, concurring in the Wilkerson case, explained that the frequent grants of certiorari in FELA cases were justified because the courts, including the Supreme Court, had previously frustrated the congressional policy that juries determine liability in such cases. Justice Douglass further stated that "[t]he criterion governing the exercise of our discretion in granting or denying certiorari is not who loses below but whether the jury function in passing on disputed questions of fact and in drawing inferences

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[2] See Note, Supreme Court Certiorari Policy in Cases Arising Under the FELA, 69 HARV. L. REV. 1441 (1956).

from proven fact has been respected" (336 U.S. at 70-71). [3] [emphasis added]

ii) Improper Service Precluded Any Notice That A Jury Trial Was Available And The Evidence At the Judge Trial Overwhelmingly Indicated A "Dispute" For Purposes of IDEA.[4]

Many times, this Court has granted review solely because of a conflict over an issue that might not otherwise be deemed important. United States v. Calamaro, 354 U.S. 351 (1957); Patterson v. United States, 359 U.S. 495 (1959).

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[3] The same concern for preserving jury trial rights was reflected in Beacon Theatres, Inc v. Westover, 359 U.S. 500, 501 (1959), where certiorari was granted to review an interlocutory order in a civil antitrust case that would have permitted trial of a major issue in equity by the trial court sitting without a jury.

[4] Education of All Handicapped Children Act (EAHCA) was amended in 1990 and is now known as the Individuals with Disabilities Education Act (IDEA).

Petitioner's case already has been deemed important by the U.S. Supreme Court on prior occasion. In McGee v. International Life Ins. Co., 355 U.S. 220, 221(1957), certiorari was granted to review constitutional issues relating to service of process under a California statute, which issues were found to be important "not only to California but to other States which have similar laws."

Undeniably, one factor that lends importance to a decision involving statutory construction or application is the significance of the issue in the administration of the statute (United States v. Ruzicka, 329 U.S. 287 (1946)), or the serious hindrance to effective administration of the law caused by the lower court decision (Rothensies v. Electric Battery Co., 329 U.S. 296 (1946)). Both factors apply here, in that the administration of IDEA and the 7th Amendment should not be thwarted by a District Court's waving of the capricious wand. No Court, District or Supreme, has the right to unilaterally change an evidentiary hearing into a full-blown trial when Petitioner was not properly served with Respondent's Answer and Respondent has been ordered by the District Court to file a joint response on the issue of standing, not an answer--this joint response was completed on 12/22/94.

Petitioner's case goes beyond merely necessitating the re-examination of the fact of proper service and the fact of whether there was a "dispute" in light of the fact that the district court disregarded its own findings from a "judicially conducted" cross-examination on that particular issue.[5] (CT 69 - 71). No, at the very minimum, this case acquires importance for Constitutional reasons as to the 7th Amendment and the District Court's ability to completely disregard the replies of Respondent to its own Court conducted queries and cross-examination which blatantly admitted there was NO AGREEMENT. CT 70.13).

Let this Supreme court be fully aware that any factual issues that would need re-examination by the Court would involve a "very obvious and exceptional show of error." Graver Mfg. Co. v. Linde Co., 336 U.S. 271, 275 (1949), and cases cited; Goodman v. Lukens Steel Co., 482 U.S. 656, 665 (1987).

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[5] The issue of whether there was a "dispute" between the parties need not be decided by this Court if the Court finds that Petitioner was entitled to a jury trial.

This case is one of those "rare instances where the standard appears to have been misapprehended or grossly misapplied." Mobil Oil Corp. v. FPC, 417 U.S. 283, 310 (1974); The lower Court misapprehended and grossly misapplied the facts of service and "dispute" in coming to its judge-trial findings. Additionally, the District Court, in the middle of an evidentiary hearing, denied all demands for a jury trial, initiated a judge trial on the spot and decided in the State's favor. Surprise, Surprise.

Thus, on both the factual issue as to whether there was a "dispute" for purposes of IDEA that would allow the prevailing party to receive attorney fees and as to whether or not Petitioner was properly served with Respondent's Answer to arguably thwart Petitioner's numerous oral motions for a jury trial when the evidentiary hearing was suddenly transformed into a judge trial by District Court fiat, are Constitutionally and Statutorily (IDEA) relevant, important and reveal a fact pattern that is so easily repeatable as to shock the conscience of the community from which I will hopefully one day soon draw my jury of Justice.

iii) Erroneousness of Decision Below Justifies Certiorari

It is enough that four or more Justices should be so doubtful of the correctness of the decision below that further consideration of this case is necessitated. The decision below represents a gross miscarriage of justice[6] and a subtle erosion of a statutory or legal principle,[7] and that the result reached below is unduly harsh in its impact. Also, proper supervision of the federal judiciary demands

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[6] Thompson v. City of Louisville, 362 U.S. 199 (1960); Washington v. United States, 357 U.S. 348 (1958). Of Chief Justice Hughes it has been said that "he was interested in preventing grave miscarriages of justice, and occasionally he would recommend the grant of certiorari in a case of no public importance whatever simply because the decision below was unjust, unreasonable, or plainly wrong." E. McElwain, The Business of the Supreme Court as Conducted 179 Chief Justice Hughes, 63 HARV. L. REV. 5, 13 (1949).

[7] An example of such an erosion is to be found in the one-time view that the right to a jury trial in FELA cases had been unduly curtailed in many instances.

that the lower court be set aright. The Court should grant certiorari to correct the lower court's blatantly erroneous decision, involving IDEA and the Right-to-Trial, which is of public importance.

In the alternative and at minimum, this Court should order summary reversal as to the right of Petitioner to have a jury trial to correct the erroneous lower court decision which may not, in the Court's view, warrant full briefing and argument.

II. STATEMENT OF THE CASE

On November 9, 1993, a complaint was filed by Ann Kletzelman against Capistrano Unified School District, alleging that there was a dispute as to the educational requirements for David Kletzelman following his April 27, 1993 I.E.P. meeting which required the intervention of attorney Emir Phillips to insure the child received the proper education. The complaint requested attorney's fees for the assistance Emir Phillips provided in attaining placement for David Kletzelman in the Mardan School for children with Severe Emotional Deficiencies. The respondents disagreed with Ann Kletzelman, but did place David in the school following the intervention of Emir Phillips.

The District Court rejected Ann Kletzelman's claim for attorney fees under IDEA and on February 10, 1994, Judge McLaughlin entered an order that Ann take nothing by her complaint, and awarded the respondents reasonable costs for the suit.

Ann Kletzelman appealed the decision of the district court to the United States Court of Appeals for the Ninth Circuit. The United States Court of Appeals for the Ninth Circuit affirmed the holding of the district court.

STATEMENT OF ISSUES

I. Whether it was improper for the court to deny petitioner's repeated oral motions for a jury trial?

II. Whether it was improper for the court to rule against its own finding that there was a dispute among the parties at the administrative level?

STATEMENT FOR ATTORNEY'S FEES.

Title 20 U.S.C. section 1415 provides for attorney's fees and reads as follows. "In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of costs to the parents or guardian of a handicapped child or youth who is the prevailing party." Prescott v. Palos Verdes Peninula Unified Sch. Dist., 659 F. Supp. 921 (C.D. Cal. 1987).

Attorneys' fees may be recovered under 20 U.S.C. § 1514(e)(4)(B) when a settlement is reached prior to a due process hearing when there is a prevailing party. Barlow-Gresham, 940 F.2d at 1285.

STATEMENT OF FACTS.

Ann Kletzelman is the mother of David Kletzelman, a youth who qualifies for special education under IDEA due to his learning disabilities, Serious Emotional Disturbances ("SED"), Attention Deficit Disorder ("ADD"). David Kletzelman also suffers from a host of other emotive and psychic disorders. (Appendix III). Respondent, Capistrano Unified School District

("District") has been responsible for the provision of a Free Appropriate Public Education ("FAPE") since January 1992.

Despite the repeated pleas of Ann Kletzelman beginning in 1992, the District failed to properly assess David to detect his suffering from learning disabilities, SED and ADD.

The services of Emir Phillips were retained for the purpose of representation for the pending April 27, 1993 IEP for David Kletzelman.

At the April 27, 1993 IEP, the District refused to acknowledge that David was SED despite the testimony of Dr. Robert Dorbin, psychiatrist. Even though Dr. Dorbin testified that David suffered from SED and required placement in a non-public agency, the District refused to recognize his assessment.

The District denied Ann's request to have David placed at the Mardan School where his specific learning disabilities could be addressed. The District arranged a FAPE for David which was opposed by Ann Kletzelman, Joel Kletzelman, and Virgina Russell (an advocate from the law offices of Emir Phillips). The signed IEP sheet emphatically states, "We disagree w/ placement!" (Appendix IV).

Following the April 27, 1993 IEP meeting, there were numerous meetings between the parties and their respective representatives to establish a proper FAPE for David since the April 27 meeting did not resolve the on-going dispute. The District ultimately agreed with Ann Kletzelman and decided that David was indeed SED and required placement at the Mardan School, a state-certified nonpublic agency located in Irvine, California.

Even though the District continuously refused to acknowledge that David was SED thus requiring special placement; and only after Emir Phillips interceded on behalf of David, did the District seriously negotiate and finally concede that David was in fact SED. Petitioner therefore requested to have her attorney fees paid by the District pursuant to the mandate of IDEA, 20 U.S.C. §1415(e) (4) (B). To this date, the District has steadfastly refused to pay.

Consequently, Petitioner filed a complaint in the district court on October 15, 1994. After the filing of the complaint there were numerous contacts between the parties in hopes of expediting the

court proceedings. Therefore, the parties filed the following documents:

1. A joint declaration regarding undisputed relevant facts and disputed relevant facts on December 8, 1993; and

2. A joint request for summary judgment or in the alternative an evidentiary hearing on December 22, 1993. (Appendix V)

On December 27, 1993, the district court ordered an evidentiary hearing for February 7, 1994.

However, unbeknownst to Petitioner, the Respondents purportedly filed an answer to the complaint on January 6, 1994; after the matter had been scheduled for an evidentiary hearing. Notwithstanding the proof of service to the answer which purports to have served petitioner on December 16, 1993, (21 days prior to the filing) petitioner denies ever being properly served with said answer. Unbeknownst to Emir Phillips a faxed copy of said complaint was forwarded to the Law Office of Emir Phillips in mid-December, 1993, but, pursuant to office procedure at the time, it was placed loosely into the file by an office clerk (to await

the properly served pleading which would have been indexed into the file properly).

As the properly served document never arrived, no such document was ever properly indexed into the file and Emir Phillips never became aware of the answer.

Moreover, throughout the negotiations, respondent never mentioned that an answer had been filed or even that an answer might be filed at some future point. The focus of the conversations between the parties during the month of December, 1993, had always been whether their was standing to bring the suit and the proper way of resolving that issue.

At evidentiary hearing, the court and the petitioner, for the first time, discovered that an answer had been filed. Initially, the matter began as an evidentiary hearing to determine standing (CT 15,10); however, the court's clerk discovered from the docket that an answer had been filed. (CT 13.17) Whereupon, the court, with a stipulation from respondent only (CT 15.12), immediately changed the nature of the proceedings to a trial, at which time Petitioner immediately made repeated oral motion for jury trial over and above the court's constant objection. (CT 16-26) The

court deemed the answer filed on January 6, 1994, and repeatedly denied the numerous oral motions as untimely as the FRCP only allow ten days after an answer is filed to request a jury trial.

During the hearing which had now become a trial, the court went to great lengths in its judicial cross-examination of respondent to establish the existence of a dispute between the parties at the administrative level which the court did in fact establish. (CT 67-71) However, notwithstanding its own findings which it painstakingly yanked from the mouth of respondent, the court eventually held that no dispute existed and found in favor of respondent.

REASONS FOR GRANTING THE PETITION

I. THE RESPONDENTS IMPROPERLY SERVED THEIR ANSWER UNDER FRCP 12 (B) (5), AND THUS, THE REPEATED ORAL DEMAND FOR JURY TRIAL WAS BOTH PROPER AND TIMELY.

The FRCP 12(B)(5) defense Petitioner raised at the evidentiary hearing was that of improper service along with there having been no actual notice as well; but even if there had been actual notice of the filed answer by respondents, the law on this point is crystal clear. Actual notice does not validate an otherwise imperfect service of process. Campbell v.Gasper, 102 F.R.D. 159, 161 (D. Nev. 1984).

The respondents failed to properly serve a copy of their answer upon Ann Kletzelman. A facsimile is improper service and does not constitute service of process within FED.R.CIV. 12(b).

The law offices of Emir Phillips only received a courtesy copy of the answer. Emir Phillips never received a true copy properly served, and was unaware of even the courtesy copy. The office policy of the law offices of Emir Phillips is to file the true copy of the answer with a two hole punch on the inside of the cover, and place the courtesy copy loosely in the file until such time as the actual document is served. However, a copy of the answer was never served upon Attorney Phillips, and thus was ever entered into the file.

The court learned of the answer as follows:

THE COURT. ...I am afraid I am taking your only copy, Mr. Phillips.

MR. PHILLIPS: That's all right.

THE COURT: If this answer is filed, or if I deem it filed now if they can t find it in the Clerk's Office, then basically this is a trial on your complaint. That s where you are. I was trying to solve this matter by an Order to Show Cause because I saw it as a standing question as you briefed extensively.

MR. WENKART: We would stipulate to making this a trial. Record page 15, lines 3-13.

The court deemed the answer filed on January 6 but failed to consider the issue of improper service. The necessity of proper service is to provide Ann Kletzelman with notice of the respondents actions.

The failure of service denied Ann Kletzelman the opportunity to prepare for any type of trial (bench or jury), and the proceeding on February 7, 1994 was intended as an evidentiary hearing, not a trial.

The district court's acceptance of the answer constitutes a proper filing of the answer on February 7, 1994 rather than on

January 6, because Ann Kletzelman did not have notice of the answer at the earlier date. The 2/7/94 service was proper since the relevant parties were present in the courtroom when Judge McLaughlin accepted the answer; thus, the date of filing of the last pleading should be February 7, 1994 due to the failure of the respondents to properly serve Ann Kletzelman.

Therefore, Petitioner's requests and demands for a jury trial were both timely and proper under the circumstances that sprung from the evidentiary hearing.

II. THE DISTRICT COURT IMPROPERLY DENIED ANN KLETZELMAN'S DEMAND FOR A JURY TRIAL WHEN THE NATURE OF THE PROCEEDINGS WAS UNILATERALLY TRANSFORMED FROM AN EVIDENTIARY HEARING TO A JUDGE TRIAL UPON THE COURT'S DISCOVERY OF RESPONDENTS' ANSWER, WHICH THEN CONSTITUTED THE LAST PLEADABLE MOTION.

The district court improperly denied Ann Kletzelman's motion for a jury trial after it accepted the respondents answer and

unilaterally tranformed the proceedings from an evidentiary hearing to trial.

In addition to well-established federal law, the following transcript excerpts highlight with abundant clarity Petitioner's repeated requests for a jury trial and the Court's refusal to accept said requests as either timely or proper:

MR. PHILLIPS: Your honor, then I would like to make for the purposes of the record an oral motion for a demand for a jury trial, and if it is your ruling that it is denied then so be it.

THE COURT: It's the law, and I am follow[sic] the law Mr. Phillips, so I'm wondering why you will not accept the law.

MR. PHILLIPS: I will accept the law as interpreted by this court, and I am sure the Court is right, but for purposes of a record and an appealable issue, I would now like to make an oral motion to demand a jury trial.

Record page 21, lines 1-11.

It is crystal clear the district court erred in denying Ann Kletzelman's requested oral motions for a jury trial because her request was indeed timely. The proceeding set for the February 7, 1994 court date was to be an evidentiary hearing. Both parties

briefed for the Order to Show Cause and were present to argue that issue. It was not until Judge McLaughlin received notice from the respondents that an answer was filed that the nature of the proceeding was altered.

The posture of the case at the time was to determine a pleading issue. Any answer would follow the Order to Show Cause after the evidentiary hearing been held. Therefore, there was time following the evidentiary hearing on February 7,1994 for the respondents to file an answer, and then the ten days would run from then. However, Judge McLaughlin altered the posture of the proceeding to a trial based upon the answer it discovered during the evidentiary hearing.

The improper service upon Ann Kletzelman prevents the January 6 date from being the appropriate filing date. The ten day time limit is tolled until Ann received proper notice of the answer. Ann Kletzelman received notice of the answer during the evidentiary hearing when Judge McLaughlin altered the posture of the case from an Order to Show Cause hearing to a judge trial.

The existence of an answer surprised Ann Kletzelman and she did not know the proceeding was a judge trial until the posture

was unilaterally changed in court. Therefore, the court deemed the answer filed, but should not have denied Ann Kletzelman's demand for a jury trial because the ten day limit began to run on February 7. The oral motions for a jury trial were made in a timely manner minutes after the answer was recognized and Judge McLaughlin was altering the posture of the case. Therefore, the district court improperly denied Ann Kletzelman's oral motion for a jury trial because it was timely and followed immediately on the heels of her receiving notice of the respondent's answer.

The answer may be considered the last pleading directed to the issue at bar, and thus FED.R.CIV. 38(b) would allow Ann Kletzelman ten days to demand a jury trial from February 7, 1994, which was repeatedly done that very same day.

Her jury demand was made moments after notice of the answer, last pleading, thus the district court erred in denying her motion for a jury trial.

III. ANN KLETZELMAN SUCCEEDED ON THE ISSUE OF ATTAINING A SPECIALIZED EDUCATION FOR DAVID KLETZELMAN, DESPITE THE PERSISTANT RESISTANCE

OF THE RESPONDENTS; THEREFORE, THROUGH HER EFFORTS AND THE WORK OF HER ATTORNEY EMIR PHILLIPS, THE DISPUTE WAS RESOLVED IN HER FAVOR, AND SHE IS THE PREVAILING PARTY.

The central issue test for a prevailing party has been rejected, and the court applies a standard requiring the prevailing party to "succeed on any significant issue in the litigation which achieves some benefit [she] sought in bringing the suit." Texas State Teachers Assn., 489 U.S. at 791-792, citing Nadeau v. Helgemoe, 581 F.2d 275, 278-279 (C.D. Cal. 1978), quoted in Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). The 'prerequisites of prevailing party status" are: 1) the remedy received must alter the relationship between the parties, and 2) the nature of the remedy must further the purpose of the HCPA. Angela L. v. Pasadena Indep. Sch. Dist 918 F.2d 1188, 1196 (5th Cir. 1990). The relief achieved under part one of the test is detained through a common sense comparison between the demand and the relief. Wheeler v. Towanda Area School District, 950 F.2d 128, 131 (3rd Cir. 1991). Further, the issue succeeded upon need only be legally relevant if

not substantial, so long as the relationship between the parties is altered. Angela, 918 F.2d at 1193.

There was a legitimate on-going dispute between Ann Kletzelman and the respondents. The age-old dispute was crystalized and hightened on April 27, 1993 at the Individualized education program meeting called to assess David's needs. Despite the request of Ann Kletzelman, the respondents again refused to place David in a special learning environment (private) and decided to place him in the local school (public). Despite the statements of Dr. Dobrin that David was suffering from Severe Emotional Disturbances (SED) which required specialized educational media to further his education, the school, in keeping with their year-old position, refused to grant Ann Kletzelman's request.

The options selected at the April 27, 1993 IEP meeting established an even greater adversarial relationship between Ann Kletzelman and the respondents. In opposition to the desire of Ann Kletzelman, and the information provided by Dr. Dobrin, the respondents concluded hat David had a "speech/language" disorder and only provided two 30 (thirty) minute sessions a week

for him, and special day class. The record sheet for the April 1993 IEP clearly indicates that Ann Kletzelman did not agree with the placement, and an adversarial relationship is clearly established through the note written on the sheet which states, 'ONLY SPEECH & LANGUAGE THERAPY...WE DISAGREE W/ PLACEMENT."(see Appendix IV)

There was undoubtedly a dispute between Ann Kletzelman and the respondents, and the district court recognized this fact, yet denied Ann Kletzelman attorney's fees due to a lack of a dispute. The court addressed the existence of the dispute as follows:

THE COURT: But you didn't agree with her?

MR. WENKART: No .

THE COURT: Did you agree with her?

MR. WENKART: No.

THE COURT: Okay. You did not agree with her. What's --

MR. WENKART: But we did not disagree with her either.

THE COURT: You finally said that. It's really hard when you go with a lawyer. It's what we are trained to do from law school on.

MR. WENKART: An occupational hazard I guess. But the School District did not disagree with her either.

THE COURT: Did not disagree tries to use two negatives, and it just comes out a positive. We are taught that in law school, too, Mr. Wenkart. So you were not agreeing -- you did not agree on April 27 to appropriate private placement? You did not agree to that?

MR. WENKART: No, it was not agreed to. It was agreed that an assessment would be done by Orange County Mental Health.

THE COURT: You did not agree with what she wanted?

MR. WENKART: That's correct, but she hadn't established that that's what she wanted.

THE COURT: I'm sorry?

MR. WENKART: It was not established that that's what she proposed.

THE COURT: I would say it differently. I asked her if she was rejecting the communicatively handicapped program of April 27, and she said she was.

MR. WENKART: I understood her to say to herself not to the district, that she didn't communicate that to the district. That's how I understood the testimony, that she did not make her indications clear and that she did not communicate --

THE COURT: Mrs. Kletzelman, did you make it clear on April 27 that you rejected communicatively handicapped as the placement for the fall of '93?

THE WITNESS [Ann Kletzelman]: Yes. At the end of the IEP, I did, Yes.

THE COURT: Okay. Established...

Record page 69, line 14 - page 71, line 10.

The court recognized that Ann Kletzelman disagreed with the April IEP, yet failed to recognize the dispute as such. Therefore, by the Court's own ackowlegment ("Okay. Established"), there was a dispute which was not resolved, and there was a polarization; and still the Court ruled there was no dispute!

Contrary to the district court's incredible ruling, there was a polarization of interests at the April IEP and before. The respondents wished to place David in the local public school, and Ann Kletzelman demanded that David be placed in an appropriate special education environment at a non-public school. Ann Kletzelman disagreed with the findings and indicated on the April IEP sheet that she did not agree with the respondents' determination. Ann demanded that David be placed in the

appropriate educational setting, but the respondents refused to accommodate her wishes.

At this point there was a well-established dispute between the desires of Ann Kletzelman and the respondents. Ann wished to place David in a non-public school environment which could accommodate his special learning needs, while the respondents wished to place David in a public school with inadequate teaching facilities. Further, Ann Kletzelman argued that David was SED as per the diagnosis of Dr. Dobrin, but the respondents disputed that finding and determined that he was only speech and language disabled. Therefore, the parties were not in agreement and a genuine dispute existed.

Ann Kletzelman requested another IEP to assess David's needs since she strongly disagreed with the determination of the April meeting. Ann requested the presence of attorney Emir Phillips and advocate Virginia Russell at the ensuing meeting to provide assistance in attaining the appropriate IEP for David. The second IEP was held on June 29, 1993.

In preparation for this IEP, which would be attended by Ann's attorney and advocate, the respondents tested David to fortify their

own position that he was speech and, language deficient, and not SED as Ann Kletzelman demanded. However, the results of the respondents' testing confirmed the tests of Dr. Dobrin and the requests of Ann Kletzelman.

The respondents claim that they discredited Dr. Dobrin because his SED report was oral, yet the Orange County Mental Health report was oral as well, Record page 91, lines 9-10, so the school did not act in good faith in denying Ann Kletzelman s demand, and obscured its true intent in testing David.

At the second IEP held on June 29, 1993, Emir Phillips attended and the respondents finally agreed with the assessments provided by Ann Kletzelman and Dr. Dobrin. David was then classified as SED and plans were made to place him in a non-public school which could address his special needs. The only logical conclusion to be drawn from these facts is that the dispute was resolved in favor of Ann Kletzelman who received significantly all that she requested and that the respondents disputed that she should receive.

Therefore, there was a dispute between the polarized parties, and the dispute was resolved in favor of Ann Kletzelman. The

District Court erred in concluding that there was no dispute, and further that Ann Kletzelman was not the prevailing party.

CONCLUSION

The Court of Appeals was in error for the following reasons:

The respondents failed to properly serve Ann Kletzelman with their answer. Therefore, the date of filing of the last pleading on the issue should be February 7, 1994 , since that is the date that Ann Kletzelman received notice of the answer. Therefore, the ten day limit for a demand for a jury trial began to run on February 7, 1994.

The district court incorrectly denied Ann Kletzelman's oral motion for a jury trial. The demand was timely and followed moments after the district court recognized the respondents' answer and altered the posture of the proceeding from an evidentiary hearing to a judge trial. Therefore, Ann Kletzelman's demand for a jury trial was improperly denied by the district court.

The district court also erred in denying Ann Kletzelman attorney's fees. The district court incorrectly held that there was not a dispute, and further that Ann Kletzelman was not he prevailing party. Ann Kletzelman was the prevailing party on the genuine dispute as the proper education for David Kletzelman. She was successful in having David classified as SED and placed in the non-public school environment provided by Mardan. Therefore, the district court erred in denying attorney's fees.

This Court should reverse the Court of Appeals and grant Ann Kletzelman her constitutional right to a jury trial and/or attorney fees.

Date:

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